

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 18, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCIANO MUÑOZ-DE LA O,

Defendant.

NO: 2:20-CR-134-RMP-1

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

BEFORE THE COURT is Defendant Marciano Muñoz-De La O's Motion to Dismiss, ECF No. 61. The Court heard oral argument on the motion on January 28, 2022. Defendant, pursuant to the CARES Act § 15002(b)(2), Pub. L. No. 116-136 (H.R. 748) (eff. March 27, 2020); General Order No. 20-101-3 Extended (E.D. Wash. Jan. 14, 2022); and General Order No. 2021-5 (E.D. Wash. March 19, 2021), expressly waived his right to be physically present, *see* Fed. R. Crim. P. 43(a), and consented to appear by video conference for this hearing.

Defendant, who is not in custody, was represented by Assistant Federal Defenders J. Houston Goddard and Payton B. Martinez. Defendant was assisted

1 by court-certified interpreters Natalia Rivera and Susan Evans. Assistant United
2 States Attorney Michael J. A. Ellis appeared on behalf of the Government.
3 Counsel, the Court, and court personnel also appeared via video conference.

4 The Court heard testimony from Defendant's expert witness, Professor
5 Deborah S. Kang, an Associate Professor of History at the University of Virginia.¹
6 Having reviewed the parties' filings, heard the argument and testimony presented at
7 the evidentiary hearing, and reviewed the relevant law, the Court is fully informed.

8 I. BACKGROUND

9 Defendant Marciano Muñoz-De La O is a citizen and national of Mexico.
10 ECF No. 23. On October 21, 2020, Defendant was indicted for violating 8 U.S.C.
11 § 1326 by unlawfully reentering the United States after having been previously
12 denied admission, excluded, deported, and removed. *Id.* Defendant moves to
13 dismiss the Indictment, ECF No. 23, on the basis that § 1326 violates the Fifth
14 Amendment's guarantee of equal protection. ECF No. 61. Defendant argues that
15 "racism motivated Congress to criminalize reentry" and that § 1326 "disparately
16 impacts Latinxs." *Id.* at 4 (citing *Village of Arlington Heights v. Metropolitan*

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18 ¹ Counsel for Defendant orally moved for Professor Kang to be certified as an
19 expert in the history and legislative history of United States immigration law.
20 Professor Kang has a doctorate degree in United States History, Late Modern
21 European History, and Law and Social Theory. The Government had no objection,
and the Court granted the request.

1 *Housing Development Corp.*, 429 U.S. 252, 265–68, 97 S. Ct. 555, 50 L. Ed. 2d
2 450 (1977)).

3 A. Overview of United States Immigration History Prior to § 1326²

4 A review of the decades leading to the enactment of § 1326 reveals this
5 country’s checkered past in immigration policies. The federal government first
6 forayed into the realm of immigration legislation during the 1870s. ECF No. 64 at
7 5. One decade later, the 1882 Chinese Exclusion Act prohibited Chinese laborers
8 from entering the United States for ten years. Pub. L. No. 47-126, 22 Stat. 58.
9 Despite constitutional challenges to the law, the United States Supreme Court
10 twice upheld the law’s validity in what are now commonly referred to as the
11 Chinese Exclusion cases. *See Chae Chan Ping v. United States*, 130 U.S. 581,
12 609, 9 S. Ct. 623, 32 L. Ed. 1068 (1889) (disregarding the law’s violation of
13 existing treaties because “[w]hatever license . . . Chinese laborers may have
14 obtained . . . is held at the will of the government, revocable at any time, at its
15 pleasure”); *Fong Yue Ting v. United States*, 149 U.S. 698, 724, 13 S. Ct. 1016,
16 37 L. Ed. 905 (1893) (describing Chinese laborers as “aliens, having taken no steps
17 towards becoming citizens, and incapable of becoming such under the
18

19 ² The Court synthesizes the following background information in Parts I.A – I.C
20 based on the parties’ briefing and the testimony presented at the evidentiary
21 hearing in this matter.

1 naturalization laws” who “therefore remain subject to the power of Congress to
2 expel them . . . from the country, whenever, in its judgment, their removal is
3 necessary or expedient for the public interest”).

4 At the turn of the twentieth century, Professor Kang asserts that a “different
5 form of xenophobia emerged in response to the migration of 1.5 million Mexicans
6 [to the United States] between 1910 and 1920.” ECF No. 78-2 at 3. Specifically,
7 she asserts that leaders and lobbyists for southwestern agribusiness “created and
8 perpetuated a negative stereotype of [Mexican nationals] as a cheap, exploitable,
9 and deportable labor force” who were “mentally and morally inferior to European
10 immigrants.” *Id.* at 4. Around this same time, Congress passed multiple reforms
11 to the country’s immigration policies.

12 First, the National Origins Act of 1924 set the number of European
13 immigrants permitted to enter the U.S. to two percent of the total population of
14 each foreign-born nationality in the country as reported in the 1890 census. *See*
15 Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153.³ Professor

16
17 ³ Immigrants from the following nations were excluded from the quota system:
18 Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, the Canal
19 Zone, or an independent country of Central or South America. Immigration Act of
20 1924 §4(c). Moreover, the law prohibited the admission of aliens “ineligible to
21 citizenship,” which excluded Asian immigrants based on prior laws such as the
1882 Chinese Exclusion Act. *Id.* at §§ 2(a), 5. Immigration quotas were not

1 Kang describes the quota system as racist and discriminatory, in part, because the
2 law exempted immigrants from the Western hemisphere to guarantee that
3 southwestern growers had an easy and regular supply of exploitable Mexican
4 national workers.

5 In the ensuing years, Congress held hearings on the “eugenical aspects of
6 deportation”⁴ that described deportation as “the last line of defense against
7 contamination of American family stocks by alien hereditary degeneracy.” ECF
8 No. 61-4 at 6. During a separate congressional hearing, Congressman Box stated
9 that “[t]he admission of a large and increasing number of Mexican peons to engage
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11 “allotted to any African countries under the Act because immigrant visas were
12 allocated solely based on the nation’s white population.” *Unfit for the*
13 *Constitution: Nativism and the Constitution, from the Founding Fathers to Donald*
14 *Trump*, Jared A. Goldstein, 20 U. Pa. J. Const. L. 489, 525 n.219 (2018).

15 ⁴ As one academic has observed, “Eugenicists argued that intelligence was
16 genetically determined, and consequently, transmittable from parent to child.”
17 Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 Virginia L. Rev.
18 449, 462 (2019). In order to further the goal of creating “an American society in
19 which the population had nothing but advantageous genes running through its
20 veins[,]” Eugenicists utilized several tactics, including encouraging “the right
21 immigrants to enter the country” from Scandinavian countries while “preventing
the same from the wrong immigrants” who hailed from non-white countries. *Id.* at
463.

1 in all kinds of work is at variance with the American purpose to protect the wages
2 of its working people.” ECF No. 61-6 at 2. Congressman Box argued that the
3 presence of Mexican immigrants destroyed “schools, churches, and all good
4 community life” for white Americans. *Id.*

5 It is with this historical backdrop that Congress passed the 1929 Undesirable
6 Aliens Act (“UAA”), “which established the first criminal penalties for the acts of
7 illegal entry and reentry” into the United States. ECF No. 78-2 at 5. Professor
8 Kang testified that the UAA was a compromise between Nativists seeking to
9 restrict immigration from non-white countries and southwestern agribusiness
10 seeking a cheap and exploitable labor supply during the growing season. In the
11 Great Depression Era of the 1930s, when jobs were scarce, racial animus towards
12 Mexican Nationals grew, resulting in forced repatriation drives in places such as
13 Los Angeles, California. The repatriation drives sought to remove ethnic
14 Mexicans from the country, based on the false viewpoint that Mexicans were
15 responsible for the nation’s economic crisis. *Id.* at 5–6. An estimated 500,000
16 ethnic Mexicans, including Mexican Americans, were forced to leave the United
17 States during this time period. *Id.* at 6.

18 Despite the UAA’s passage and the repatriation drives of the 1930s,
19 undocumented immigration rose during the 1940s, coinciding with the 1942
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21

1 Bracero Program.⁵ ECF No. 78-2 at 7. The Bracero Program created bilateral
2 agreements between the United States and Mexico for temporary Mexican
3 laborers, many of whom would be “exploited” and “racialized[,]” to work
4 temporarily on farms in the United States. *See id.* at 4 (stating that agricultural
5 growers “claimed that ‘braceros were a unique[,] docile group of people, denuded
6 of ambition and complacent with their status in life as a result of centuries of
7 servitude and brutal exploitation on the haciendas.’” (quoting Lawrence A.
8 Cardoso, Mexican Emigration to the United States 1897–1931 124 (1980)).⁶

9 As Professor Kang testified, the mid-twentieth century also is linked to the
10 popularization of the racially derogatory term, “wetback,” to describe the Mexican
11 immigrants who were forced to cross the Rio Grande River to enter the United
12 States. Use of this racial slur carried into the 1950s, when Senate Bill 1851,

14 ⁵ The Bracero Program “led to the admission of approximately 4.5 million
15 temporary workers from Mexico between 1942 and 1964.” ECF No. 78-2 at 7.
16 “[O]ver the twenty-two-year-course of the Program, approximately five million
undocumented immigrants would cross the U.S.-Mexico border.” *Id.* at 10.

17 ⁶ Professor Kang states that the screening process for braceros was
18 “dehumanizing” and notes that photographer Leonard Nadal “documented the
19 fumigation of braceros with DDT at the [U.S.-Mexico border] processing centers
20 in the United States.” ECF No. 78-2 at 10. At the evidentiary hearing, Professor
21 Kang testified that braceros often were denied the wages and other benefits their
contracts promised them.

1 referred to by some congressmen as the “Wetback Bill,” sought to bar “aliens from
2 entering or remaining in the United States illegally” while simultaneously
3 protecting employers from prosecution for “harboring” undocumented employees.
4 Pub. L. No. 82-283, 66 Stat. 26 (1952).⁷ Numerous congressmen continued to use
5 the racial slur when discussing potential amendments to Senate Bill 1851.⁸

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7 ⁷ Senate Bill 1851 amended the 1917 Immigration Act and is not directly related to
the recodification of § 1326.

8 ⁸ *See* 82 Cong. Rec. 8115 (June 26, 1952) (Senator Magnuson offered an
9 amendment to “the enforcement and administration of what is called the wetback
10 bill passed by the Congress several weeks ago”). During these same hearings,
11 Senator Humphrey offered a further amendment to increase the Immigration and
12 Naturalization Service budget by \$2,500,000 to support an “airlift operation” for
13 transporting undocumented immigrants back to Mexico. *Id.* at 8121. Throughout
14 the discussion of the different appropriations amendments, multiple senators used
15 the racial slur “wetback.” *See, e.g., id.* (“Soon we shall vote on the question of
16 whether the Senate wishes to do something about the wetbacks, or whether again
17 the Senate will fail to act in accordance with its responsibilities to stop this
18 invasion . . . by illegal entrants, who drive down our standard of living . . . and
19 jeopardize the health and security of our Nation.”); *see also id.* at 8122 (“It
20 suggests to me that . . . instead of being called the wetback amendment, perhaps
21 [it] should be called the catback amendment, having in mind the time-honored
custom of taking a cat as far away from home as possible and then turning it loose,
in the hope that it could not get back.”). However, Senator Humphrey’s
amendment was voted down by a count of 11 ‘yeas’ to 65 ‘nays.’” *Id.* at 8123.
The other proposed amendments also were overwhelming rejected. *Id.* at 8123–24.

1 B. Relevant History and Legislative Record Regarding § 1326

2 In 1952, Congress recodified the unlawful reentry provision of the 1929
3 UAA at 8 U.S.C. § 1326. The new statute provided the following:

4 Any alien who— (1) has been arrested and deported or
5 excluded and deported, and thereafter (2) enters, attempts
6 to enter, or is at any time found in, the United States,
7 unless (A) prior to his reembarkation at a place outside the
8 United States or his application for admission from foreign
9 contiguous territory, the Attorney General has expressly
10 consented to such alien’s reapplying for admission; or (B)
with respect to an alien previously excluded and deported,
unless such alien shall establish that he was not required
to obtain such advance consent under this or any prior Act,
shall be guilty of a felony, and upon conviction thereof, be
punished by imprisonment of not more than two years, or
by a fine of not more than \$1,000, or both.

11 Pub. L. No. 82-414, Title II, § 276, 66 Stat. 229. Professor Kang argues that
12 Senator Pat McCarran, co-author of the 1952 Immigration Nationality Act (“1952
13 INA”)⁹ “worked to remove obstacles to the undocumented crossings of Mexican
14 workers” to defend “a widespread system of labor exploitation premised upon
15 racist notions of Mexican migrants as expendable farmworkers.” ECF No. 78-2 at
16 18.

17 In the buildup to Congress’s enactment of the 1952 INA, Professor Kang
18 describes Senator McCarran as regularly wielding “his authority to delay and block
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20 ⁹ The 1952 INA also is referred to as the McCarran-Walter Act after its
21 congressional sponsors, Senator Pat McCarran and Representative Francis Walter.

1 the passage of any liberal reforms.” *Id.* at 20.¹⁰ As for § 1326, specifically,
2 “Congress remained largely silent with respect to the recodification of the criminal
3 entry and re-entry provisions of the immigration laws in the 1952 Act” and “made
4 no effort to examine or cleanse the anti-Mexican racism that infected the [1929
5 UAA].” ECF No. 78-2 at 22. Instead, the changes made to the recodification of
6 unlawful reentry at 8 U.S.C. § 1326 supposedly made the crime “easier to
7 prosecute.” *Id.*; *see also* ECF No. 61-16 at 7 (noting that the recodified unlawful
8 reentry provision’s inclusion of noncitizens who are “subsequently found” in the

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10 ¹⁰ Professor Kang also points to comments made by Senator McCarran during two
11 appropriations hearings that occurred one year before and after the 1952 INA
12 became law. ECF No. 78-2 at 19. In 1951, Senator McCarran described the “flood
13 of people” who come across the border, legally or illegally, as “wet-backs” who
14 engage in “come-and go drifting” between Mexico and the United States during
15 various harvest seasons. ECF No. 78-7 at 4 (Hearing on Deportation of Mexicans
16 Before the Subcomm. on Appropriations, 82nd Cong. 124 (1951)). During a 1953
17 appropriations hearing, Senator McCarran stated that southwestern growers could
18 not “get along without” Mexican farm labor, noting that “on this side of the border
19 there is a desire for these wetbacks.” ECF No. 78-6 at 31–32 (Hearing on H.R.
20 4974 Before the Subcomm. on Appropriations, 83rd Cong. 245–46 (1953)). When
21 responding to concerns that the Bracero Program required bracero workers to be
fed, paid minimum wages, and given health insurance, Senator McCarran
responded that “[t]he wetback is little interested in that sort of thing. In other
words, a farmer can get a wetback and he does not have to go through that red
tape.” *Id.* at 32.

1 United States would “overcome the inadequacies in existing law” that required the
2 Immigration and Naturalization Service (“INS”) “to establish the place of reentry,
3 and hence the proper venue, arising in prosecutions” against deported noncitizens).

4 In a memo to Senator McCarran on behalf of the Department of Justice,
5 Deputy Attorney General Peyton Ford wrote approvingly of numerous provisions
6 in the 1952 INA, including what would become § 1326. However, Deputy
7 Attorney General Ford noted that certain language in § 1326 was “somewhat
8 obscure” and suggested clarifying language to limit the penalty exceptions for
9 noncitizens who unlawfully reenter the United States. *See* ECF No. 61-16 at 7.
10 Turning to a separate provision, Deputy Attorney General Ford noted that the law
11 as written failed to give “authority to immigration officers to go upon private
12 property for the purpose of interrogating aliens.” *Id.* at 9. To support the
13 expansion of INS’s authority to enter private property, he cited a 1951 report of the
14 President’s Commission on Migratory Labor, which provided that such a
15 clarification “will aid in taking action against the conveyors and receivers of the
16 wetback.” *Id.*

17 In summarizing the history surrounding § 1326 as well as the entirety of the
18 1952 INA, Professor Kang argues that “both congressional conservatives and
19 liberals played an active and deliberate role in extending the racism that inhered in
20 the nation’s immigration laws via the passage of the [1952 INA].” *Id.* at 24. On
21 June 25, 1952, President Truman vetoed the Congressional bill, citing a number of

1 concerns with the proposed law. Chief among them was that “[t]he bill would
2 continue, practically without change, the national origins quota system.” ECF No.
3 61-15 at 4. President Truman noted that the quota system “discriminates
4 deliberately and intentionally, against many of the peoples of the world.” *Id.*¹¹ He
5 observed that “[s]eldom has a bill exhibited the distrust evidenced here for citizens
6 and aliens alike—at a time when we need unity at home, and the confidence of our
7 friends abroad.” ECF No. 61-15 at 7.

8 President Truman also compared the bill to the “infamous Alien Act of
9 1798, passed in a time of national fear and distrust of foreigners, which gave the
10 President the power to deport any alien deemed ‘dangerous to the peace and safety
11 of the United States.’” *Id.* at 8–9. Despite these misgivings, Congress overrode
12 the presidential veto, and the law went into effect on June 27, 1952.

13 C. Subsequent Amendments to § 1326

14 Since 1952, Congress has amended §1326 five times. First, the 1988 Anti-
15 Drug Abuse Act created the concept of an “aggravated felon[y].” ECF No. 78-2 at
16 51; *cf.* ECF No. 78 at 26. The amendment also enhanced penalties for “criminal

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18 ¹¹ President Truman’s remarks about the bill’s deliberate and intentional
19 discrimination mostly center on the President’s qualms with the historical
20 treatment of Asian, not Hispanic, individuals in United States immigration policy.
21 *See* ECF No. 61-15 at 11 (urging Congress “to enact legislation removing the
racial barriers against Asians from our laws”).

1 aliens” by up to five years’ imprisonment and up to 15 years for those with a prior
2 “aggravated felony” conviction. Pub. L. 100-690, Title VII, § 7345(a), 102 Stat.
3 4471 (Nov. 18, 1988). Next, the Immigration Act of 1990 authorized greater fines
4 for § 1326 prosecutions, although the legislative history for the amendment “is
5 very thin.” ECF No. 78-2 at 52; *cf.* ECF No. 78 at 28.

6 The 1994 Violent Crime Control and Law Enforcement Act, “the largest
7 crime bill passed by Congress” increased mass incarceration “of citizens and
8 immigrants alike.” ECF No. 78-2 at 81. The law amended § 1326 by increasing
9 the maximum imprisonment time both for those with a prior felony conviction
10 (from five to 10 years) and for those with a prior aggravated felony conviction
11 (from 15 to 20 years). ECF No. 78 at 28–29 n.64 (citing Pub. L. 103-322, Title
12 XIII, § 130001(b), 108 Stat. 2023 (1994)). Professor Kang asserts that the 1994
13 amendment to § 1326 also occurred during a time that saw “the highest level of
14 hostility towards immigrants ‘since the heyday of the nativism in the 1920s.’”
15 ECF No. 78-2 at 68 (quoting Joseph Nevins, Operation Gatekeeper: The Rise of
16 the “Illegal Alien” and the Making of the U.S.-Mexico Boundary 90 (2002)).

17 The fourth amendment to § 1326 occurred with the passage of the 1996
18 Antiterrorism and Effective Death Penalty Act (“AEDPA”), which “limited
19 collateral attacks on deportation orders” and “mandated incarceration for
20 individuals who reentered after being deported.” ECF No. 78-2 at 85–86. No
21 congressman raised objections to the new additions to § 1326. *Id.* at 86. When

1 later speaking about immigration reform, Congressman Bill McCollum stated that
2 the new provisions in AEDPA “went too far[,]” and he introduced a measure to
3 waive deportation for permanent residents convicted of minor crimes, although the
4 measure applied only to permanent residents and not “foreigners.” *Id.* at 90.

5 Later that year, the Illegal Immigration Reform and Immigrant
6 Responsibility Act (“IIRIRA”) of 1996 further amended § 1326 “by broadening its
7 scope to include individuals who previously were removed (along with those who
8 previously were deported), and authorizing up to 10 years’ imprisonment for
9 noncitizens who reenter after being removed while on parole, supervised release or
10 probation for a nonviolent offense.” ECF No. 78 at 36 (citing Pub. L. 104-208,
11 Div. C, Title III, §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324(a),
12 324(b); 110 Stat. 3009-606, 3009-618–20, 3009-629 (1996)). Between 1996 and
13 2013, “immigration prosecutions, primarily under § 1325 and § 1326, increased by
14 a factor of ten.” ECF No. 78-2 at 97.

15 Professor Kang asserts that the five subsequent amendments to § 1326
16 “failed to extinguish the racial animus of the 1929 and 1952 laws” and, instead,
17 “reproduced the anti-Mexican sentiments that first inspired the criminalization of
18 undocumented immigration.” *Id.* at 100–101. In 2019 and again in 2021,
19 lawmakers “authored bills that would repeal these provisions of the immigration
20 code.” *Id.* at 103 (citing A New Way Forward Act, H.R. 5383, 116th Cong., Title
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VI, § 601(b) (2019); A New Way Forward Act, H.R. 536, 117th Cong., Title VI, § 601(b) (2021)).

II. LEGAL STANDARD

The Fifth Amendment of the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” Although the Fifth Amendment does not contain an equal protection clause similar to the Fourteenth Amendment, “the concepts of equal protection and due process, stemming from our American ideal of fairness, are not mutually exclusive.” *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1964). Accordingly, the equal protection analysis implicit in the Fifth Amendment “is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Challenges to official action or facially neutral laws for violation of the Equal Protection Clause require proof that a “racially discriminatory intent or purpose” served as “a motivating factor in the decision” or law being challenged. *Arlington Heights*, 429 U.S. at 265–66.

Courts will not “strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *United States v. O’Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Recognition that “legislators and administrators are properly concerned with balancing numerous competing considerations” encourages courts to “refrain from reviewing the merits of

1 [congressional or administrative] decisions, absent a showing of arbitrariness or
2 irrationality.” *Arlington Heights*, 429 U.S. at 265. Racial discrimination, however,
3 “is not just another competing consideration” and “proof that a discriminatory
4 purpose has been a motivating factor” in the challenged government action
5 eliminates the justification for “judicial deference.” *Id.* at 265–66.

6 In *Arlington Heights*, the Supreme Court established certain non-exhaustive
7 factors to guide the “sensitive inquiry” into whether a challenged government
8 action was motivated by an “invidious discriminatory purpose.” *Id.* at 266. These
9 factors include (1) the disparate “impact of the official action”; (2) the “historical
10 background of the decision”; (3) the “sequence of events leading up to the
11 challenged decision”; (4) any procedural or substantive departures; and (5) the
12 relevant “legislative or administrative history.” *Id.* at 266–68.

13 No single *Arlington Heights* factor is individually dispositive. *Id.* at 268.
14 The party asserting that a “law was enacted with discriminatory intent” carries the
15 burden of proof. *Abbott v. Perez*, ___ U.S. ___, 138 S. Ct. 2305, 2324, 201 L. Ed.
16 2d 714 (2018). Satisfaction of that burden shifts the burden to the Government to
17 establish “that the same decision would have resulted even had the impermissible
18 purpose not been considered.” *Arlington Heights*, 429 U.S. at 270 n.21.¹² “The
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20 ¹² The *Arlington Heights* decision does not explicitly address the standard for
21 satisfying each party’s burden of proof. It appears that both the party challenging a

1 allocation of the burden of proof and the presumption of legislative good faith are
 2 not changed by a finding of past discrimination.” *Abbott*, 138 S. Ct. at 2324.

3 III. DISCUSSION

4 A. Overview of Related Cases

5 Based on the Court’s own research and the parties’ briefing, it appears that
 6 approximately fourteen district court cases, thus far, have considered equal
 7 protection challenges to § 1326 that are nearly identical to Defendant’s instant
 8 motion.¹³ Of those fourteen cases, only one ruled that § 1326 was enacted with a

9 _____
 10 law for discriminatory intent and the Government are required to satisfy their
 11 respective burdens of proof by a preponderance of the evidence. *See Hunter v.*
 12 *Underwood*, 471 U.S. 222, 225, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985). In
 13 *Hunter*, the Court affirmed a ruling from the Eleventh Circuit, which applied the
 14 preponderance of the evidence standard to both the plaintiffs and the defendants.
 15 *See id.*; *see also Underwood v. Hunter*, 730 F.2d 614, 617 (11th Cir. 1984) (citing
 16 *Arlington Heights*, 429 U.S. at 270 & n.21; and *Mt. Healthy City School District*
 17 *Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471
 18 (1977)). The *Mt. Healthy* case directly states that if the burden shifts to the
 19 Government, the Government must satisfy its burden by a preponderance of the
 20 evidence, although the Court does not discuss the standard for the plaintiff. *See*
 21 429 U.S. at 287.

¹³ *See United States v. Hernandez-Lopez*, ___ F. Supp. 3d ___, No. H-21-440, 2022
 WL 313774 (S.D. Tex. Feb. 2, 2022); *United States v. Sanchez-Felix*, No. 21-cr-
 00310-PAB, 2021 WL 6125407 (D. Colo. Dec. 28, 2021); *United States v. Rivera-*
Sereno, No. 2:21-cr-129, 2021 WL 5630728 (S.D. Ohio Dec. 1, 2021); *United*

discriminatory motivation in violation of the Equal Protection Clause of the Fifth Amendment. *See United States v. Carrillo-Lopez*, ___ F. Supp. 3d ___, No. 3:20-cr-26-MMD-WGC, 2021 WL 3667330, at *25 (D. Nev. Aug. 18, 2021).¹⁴

Applying heightened scrutiny to review § 1326, the *Carrillo-Lopez* court determined that the defendant met his burden under the *Arlington Heights*

States v. Amador-Bonilla, No. CR-21-187, 2021 WL 5349103 (W.D. Okla. Nov. 16, 2021); *United States v. Samuels-Baldyaguez*, No. 4:20 CR 83, 2021 WL 5166488 (N.D. Ohio Nov. 5, 2021); *United States v. Suquilanda*, No. 21 CR 63 (VM), 2021 WL 4895956 (S.D.N.Y. Oct. 20, 2021); *United States v. Orozco-Orozco*, No. 21-CR-023459-TWR, 2021 U.S. Dist. LEXIS 178951 (S.D. Cal. Sept. 20, 2021); *United States v. Novondo-Ceballos*, ___ F. Supp. 3d ___, No. 21-CR-383 RB, 2021 WL 3570229 (D. N.M. Aug. 12, 2021); *United States v. Carrillo-Lopez*, ___ F. Supp. 3d ___, No. 3:20-cr-26-MMD-WGC, 2021 WL 3667330 (D. Nev. Aug. 18, 2021); *United States v. Machic-Xiap*, ___ F. Supp. 3d ___, No. 3:19-cr-407-SI, 2021 WL 3362738 (D. Or. Aug. 2, 2021); *United States v. Wence*, No. 3:20-CR-0027, 2021 WL 2463567 (D. V.I. June 16, 2021); *United States v. Gutierrez-Barba*, No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801 (D. Ariz. May 25, 2021); *United States v. Medina Zepeda*, No. CR 20-0057 FMO, 2021 WL 4998418 (C.D. Cal. Jan. 5, 2021); *United States v. Palacios-Arias*, No. 3:20-CR-62-JAG (E.D. Va. Oct. 13, 2020).

¹⁴ The Government appealed the decision in *Carrillo-Lopez* to the Ninth Circuit. The briefing on appeal is still being filed and a decision from the Ninth Circuit has not issued as of the filing of this Order.

1 framework and ruled that the “Government failed to establish that a
2 nondiscriminatory motivation existed in 1952 for reenacting Section 1326.” *Id.*

3 Nine other district courts, including two in this circuit, subjected § 1326 to
4 the deferential rational basis review standard and determined that the law was
5 rationally related to the Government’s immigration interests in preventing unlawful
6 reentry. *See, e.g., Gutierrez Barba*, 2021 WL 2138801, at *5; *see also United*
7 *States v. Orozco-Orozco*, 2021 U.S. Dist. LEXIS 178951, at *1.

8 In all cases where district courts applied rational basis review to § 1326, the
9 courts either determined that the *Arlington Heights* framework did not apply to the
10 defendant’s equal protection challenge or that the defendant failed to present a
11 sufficient challenge under *Arlington Heights*. *See Novondo-Ceballos*, 2021 WL
12 3570229, at *4 (ruling that the *Arlington Heights* standard is inapplicable to § 1326
13 “because as an immigration law, it is subject to rational basis review” and,
14 regardless, finding no discriminatory intent because “subsequent reenactments of §
15 1326 have cleansed the law of its original taint”); *see also Samuels-Baldayaquez*,
16 2021 WL 5166488, at *3 (declining to apply *Arlington Heights* to an immigration
17 law and noting that, “even if *Arlington Heights* applied, the Defendant has not
18 made an adequate case to invalidate 8 U.S.C. § 1326” where the defendant focused
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1 only on the legislative history of the 1929 UAA and provided “no evidence of
2 discriminatory motivation in the 1952 enactment of § 1326”).¹⁵

3 A handful of courts have applied the *Arlington Heights* framework to review
4 equal protection challenges to § 1326, although none ruled the law unconstitutional
5 other than *Carrillo-Lopez*. See *Machic-Xiap*, 2021 WL 3362738, at *10 (D. Or.
6 Aug. 3, 2021) (applying *Arlington Heights* but noting that the defendant’s strongest
7 evidence, *i.e.*, “§ 1326’s historical background and its disparate impact on people
8 from Latin America. . . . is the least valuable” to the court’s constitutional
9 analysis); see also *Wence*, 2021 WL 2463567, at *9–10 (reviewing § 1326 under
10 the *Arlington Heights* framework but concluding that “the legislative history for
11 the 1952 and 1990 legislation does not reveal any discriminatory motive” and the
12 law’s disparate impact “is not pronounced enough to give rise to an inference of
13 discriminatory motive”).

14 B. Standard of Review

15 Preliminarily, the parties dispute the applicable standard of review for
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18 ¹⁵ At least two courts analyzed the equal protection challenge to § 1326 under
19 *Arlington Heights* and then, after determining that the defendant failed to meet the
20 standard under *Arlington Heights*, the courts applied rational basis review to
21 uphold the constitutionality of § 1326. See *Wence*, 2021 WL 2463567, at *10;
Hernandez-Lopez, 2022 WL 313774, at *7.

1 Defendant's constitutional challenge. The Government maintains that the Court's
2 review of § 1326 is "subject to deferential rational basis review, not the strict
3 scrutiny as urged by the Defendant." ECF No. 64 at 4. For support, the
4 Government argues that § 1326 was "passed as part of the comprehensive
5 Immigration and Nationality Act of 1952," making "it 'well within the ambit of
6 Congress's sweeping power over immigration matters.'" *Id.* (quoting *United*
7 *States v. Hernandez-Guerrero*, 147 F.3d 1075, 1078 (9th Cir. 1998)). Defendant
8 counters that the Ninth Circuit has applied the heightened scrutiny standard
9 inherent to *Arlington Heights* "in high-profile civil immigration cases[.]"
10 demonstrating that "[a] challenged law does not receive minimal scrutiny merely
11 because it is related to immigration." ECF No. 78 at 5–6 (quoting *Dent v.*
12 *Sessions*, 900 F.3d 1075, 1081 (9th Cir. 2018)).

13 For over a century, courts have acknowledged "that Congress possesses
14 authority over immigration policy as 'an incident of sovereignty.'" *Hernandez-*
15 *Guerrero*, 147 F.3d at 1076 (quoting *Ping v. United States*, 130 U.S. at 609).
16 Congress's broad power over immigration "underscore[s] the limited scope of
17 judicial inquiry into immigration legislation." *Fiallo v. Bell*, 430 U.S. 787, 792,
18 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). Accordingly, the Ninth Circuit has
19 reviewed "equal protection challenges to federal immigration laws under the
20 [deferential] rational basis standard." *Hernandez-Mancilla v. Holder*, 633 F.3d
21 1182, 1185 (9th Cir. 2011). However, two reasons suggest that the holding in

1 *Hernandez-Mancilla* does not automatically dictate the applicable standard of
2 review in this case.

3 First, Congress’s “plenary power to create immigration law. . . . is subject to
4 important constitutional limitations.” *Zadvydas v. Davis*, 533 U.S. 678, 695,
5 121 S. Ct. 2491, 150 L. Ed. 653 (2001). In the instant case, relevant constitutional
6 limitations apply regardless of Defendant’s citizenship status “because ‘all persons
7 within the territory of the United States are entitled to protection’ of the
8 Constitution.” *Id.* at 694 (quoting *Wong Wing v. United States*, 163 U.S. 228, 238,
9 16 S. Ct. 977, 41 L. Ed. 140 (1896)); *see also Mathews v. Diaz*, 426 U.S. 67, 77,
10 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976) (recognizing that the Fifth Amendment
11 protects all individuals “within the jurisdiction of the United States[,]” even those
12 “whose presence in this country is unlawful”).¹⁶

13 Second, both the Supreme Court and the Ninth Circuit recently recognized,
14 albeit in the context of a citizenship distinction, that an “exacting standard of
15 review” may apply to immigration-related equal protection challenges. *Sessions v.*

17 ¹⁶ Relevant precedent provides that there are stronger justifications for applying
18 heightened scrutiny to constitutional challenges by non-citizens who are already
19 residing in the United States, as opposed to non-citizens who are seeking
20 admission. *See, e.g., Zadvydas*, 533 U.S. at 693 (collecting cases and noting the
21 distinction, for constitutional purposes, “between an alien who has effected an
entry into the United States and one who has never entered”).

1 *Morales-Santana*, ___ U.S. ___, 137 S. Ct. 1678 1694, 198 L. Ed. 2d 150, (2017);
2 *see also Dent*, 900 F.3d at 1081 (holding that petitioner’s equal protection claims
3 “are treated the same as they would be in a non-immigration case”).

4 The Government contends that, unlike the particular “carve-outs to rational
5 basis review of Congress’s immigration legislation,” an equal protection challenge
6 to a criminal statute previously has been “reviewed for a rational basis.” ECF No.
7 81 at 3 (citing *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091–92 (9th Cir.
8 2007) and *United States v. Lopez-Flores*, 63 F.3d 1468, 1471–75 (9th Cir. 1995)).
9 The Government’s cited cases are distinguishable from the instant case, namely
10 because both *Ruiz-Chairez* and *Lopez-Flores* involved challenges to an alienage
11 classification, not discrimination based on race or national origin. *See* 493 F.3d at
12 1091; 63 F.3d at 1475.

13 Absent direct guidance from binding authority as to the applicable standard
14 of review for an equal protection challenge to § 1326, the Court first considers
15 Defendant’s challenge under the heightened standard of review as set forth in
16 *Arlington Heights*. *See, e.g., Machic-Xiap*, 2021 WL 3362738, at *9 (“The
17 Government’s assertion that the Court has little role in policing the Fifth
18 Amendment’s boundaries in a case where the defendant faces risk of imprisonment
19 is without merit”); *Wence*, 2021 WL 2463567, at *3 (“[T]he Court can find no
20 support for the proposition that criminal laws enacted by Congress, even when they
21 are enacted in furtherance of Congress’s broad immigration power, are otherwise

1 immune from . . . upholding a right so fundamental as the equal protection of this
2 nation’s laws.”); *Carrillo-Lopez*, 2021 WL 3667330, at *3 (finding that § 1326
3 “must be reviewed under the *Arlington Heights* equal protection framework”).¹⁷

4 C. Equal Protection Challenge to § 1326 Under *Arlington Heights*

5 To guide the evidentiary inquiry into a challenged law’s discriminatory
6 purposes, the Supreme Court established several non-exhaustive factors for a court
7 to consider. *Arlington Heights*, 429 U.S. at 266–68. First, “[t]he impact of the
8 official action[,]” in burdening a particular race more than another, “may provide
9 an important starting point.” *Id.* at 266. Next, the “historical background of the
10 decision” provides a second “evidentiary source, particularly if it reveals a series of
11 official actions taken for invidious purposes.” *Id.* at 267. Similarly, the “specific
12 sequence of events leading up to the challenged decision also may shed some light
13 on the decisionmaker’s purposes.” *Id.* Courts also consider “departures from the
14 normal procedural sequence” as well as substantive departures where “factors
15 usually considered important by the decisionmaker strongly favor a decision
16 contrary to the one reached.” *Id.* Lastly, the legislative history “may be highly

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18 ¹⁷ *But see Gutierrez-Barba* 2021 WL 2138801, at *5 (applying rational basis
19 review after finding that *Arlington Heights* did not “govern the Court’s analysis”);
20 *see also Orozco-Orozco*, 2021 U.S. Dist. LEXIS 178951, at *1 (applying rational
21 basis review to the defendant’s challenge to § 1326 based on the language from the
Ninth Circuit in *Hernandez-Mancilla*).

1 relevant, especially where there are contemporary statements by members of the
2 decisionmaking body, minutes of its meetings, or reports.” *Id.* at 268. Given that
3 Defendant is charged with violating § 1326, not the unlawful reentry provision
4 contained in the 1929 UAA, the Court considers each of the *Arlington Heights*
5 factors in relation to Defendant’s constitutional challenge to the validity of § 1326,
6 specifically.

7 1. *Disparate Impact*

8 Defendant argues that § 1326 disparately impacts Latinxs and cites two
9 recent district court cases holding the same. ECF No. 61 at 8 (citing *Carrillo-*
10 *Lopez*, 2021 WL 3667330, at *6–7; *Machic-Xiap*, 2021 WL 3362738, at *10). The
11 Supreme Court has rejected the notion that “a law or other official act, without
12 regard to whether it reflects a racially discriminatory purpose, is unconstitutional
13 *solely* because it has a racially disproportionate impact.” *Washington v. Davis*,
14 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). However, the Court
15 recognized exceptions where “a clear pattern, unexplainable on grounds other than
16 race, emerges from the effect of the state action even when the governing
17 legislation appears neutral on its face.” *Arlington Heights*, 429 U.S. at 266 (citing
18 *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *Gomillion*
19 *v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960)).

20 In *Yick Wo*, the Court considered a San Francisco ordinance that made it
21 illegal to operate a laundry facility in a wooden building without a permit. 6 S. Ct.

1 at 1065. Although racially neutral on its face, the Court held that the law was
2 unconstitutional because “[t]he necessary tendency, if not the specific purpose, of
3 this ordinance . . . is to drive out of business all the numerous small laundries,
4 especially those owned by Chinese [individuals].” *Id.* at 1068. In *Gomillion*,
5 petitioners challenged the validity of an Alabama law that redefined the boundaries
6 of the City of Tuskegee. 364 U.S. at 340. The Court reversed the lower courts,
7 thereby allowing the equal protection claim to proceed to trial, given that the
8 “inevitable effect of this redefinition of Tuskegee’s boundaries is to remove from
9 the city all save four or five of its 400 Negro voters while not removing a single
10 white voter or resident.” *Id.* at 341. “Absent a pattern as stark as that in *Gomillion*
11 or *Yick Wo*, [disparate] impact alone is not determinative.” *Arlington Heights*,
12 429 U.S. at 266.

13 The Supreme Court recently considered a disparate impact argument as part
14 of a constitutional challenge to the rescission of the Deferred Action for Childhood
15 Arrivals (“DACA”) program. *See Department of Homeland Security v. Regents of*
16 *the University of California*, ___ U.S. ___, 140 S. Ct. 1891, 1915, 207 L. Ed. 2d
17 353 (2020) (ruling that the respondents’ argument that the rescission of DACA
18 disparately impacted “Latinos from Mexico, who represent 78% of DACA
19 recipients” was insufficient, to establish an equal protection violation). There, the
20 Court noted that alleged disparate impact alone did not demonstrate an invidious
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1 discriminatory purpose because otherwise, “virtually any generally applicable
2 immigration policy could be challenged on equal protection grounds.” *Id.* at 1916.

3 In the instant case, Defendant cites evidence from the Department of Justice
4 and the United States Sentencing Commission, showing that about 98% “of those
5 charged with illegal reentry in 2010 were from Latin America, and over 99% of
6 those convicted of illegal reentry in 2020 were Hispanic.” ECF No. 61 at 8; *see*
7 *also* ECF No. 78-2 at 7 (discussing the “disparate prosecution of Mexicans under
8 the [1929 UAA]”). The Government does not dispute the accuracy of Defendant’s
9 statistics but counters that such numbers “are a feature of geography and
10 geopolitics—Latin America’s proximity to the United States and related
11 socioeconomic and political conditions—not discrimination.” ECF No. 64 at 23.
12 The Government’s argument misunderstands the crux of prior Supreme Court
13 holdings regarding disparate impact.

14 In *Arlington Heights*, the Court described disparate impact as an action that
15 “‘bears more heavily on one race than another.’” 429 U.S. at 266 (quoting *Davis*,
16 426 U.S. at 242). Defendant’s statistical evidence, which the Government does not
17 refute, easily demonstrates that Latinxs are more heavily burdened by the
18 enforcement and prosecution of § 1326 violations. Accordingly, the Court finds
19 that Defendant has satisfactorily demonstrated disparate impact regardless of
20 extenuating factors that contribute to the disparity. Although the Government’s
21 proffered “geography” explanation does not undermine this finding, the Court

1 recognizes that such reasoning distinguishes this case from *Yick Wo* and *Gomillion*,
2 where no legitimate reason other than race explained the respective law’s racial
3 impact. Accordingly, § 1326’s disparate impact on the Latinx population is
4 relevant but, as in *Arlington Heights*, “the Court must look to other evidence” that
5 an invidious discriminatory purpose was a motivating factor in enacting the
6 challenged law. *Id.*

7 2. *Historical Background*

8 Setting aside disparate impact, *Arlington Heights* provides for the
9 consideration of “[t]he historical background of the decision” being challenged.
10 *Id.* at 267. Defendant argues that § 1326 is rooted in the historical background of
11 the 1929 unlawful reentry provision that was itself motivated by racist theories of
12 eugenics. ECF No. 78-2 at 4–5; *cf.* ECF No. 61 at 9. Additionally, Defendant
13 cites the rise of anti-Latinx racism from 1920 onwards, most notably evidenced by
14 the “repatriation drives” during the Great Depression and the treatment of workers
15 in the Bracero Program. ECF No. 78-2 at 5–13; *cf.* ECF No. 78 at 14. Lastly,
16 Defendant points to the use of the racial slur “wetback” by Congressmen, both
17 leading up to and following the passage of the 1952 INA. ECF Nos. 78-6 at 32,
18 78-7 at 4; *cf.* ECF No. 78 at 14–15.

19 The Government disputes Defendant’s view that “the taint of prior
20 discriminatory intent forever prevents the criminalization of illegal reentry.” ECF
21 No. 64 at 19. The *Carrillo-Lopez* decision extensively drew on the “racial animus”

1 in the period preceding the passage of the 1929 unlawful reentry provision and
2 held that the law’s “reenactment did not cleanse Section 1326 of its racist origins.”
3 2021 WL 3667330, at *9. In response, the Government argues that *Carrillo-Lopez*
4 erroneously interpreted the Supreme Court’s holding in *Abbott*, which rejected the
5 argument that a State must show that a former Legislature “somehow purged the
6 ‘taint’ that the court attributed to the defunct and never-used plans enacted by a
7 prior legislature” two years earlier. 138 S. Ct. at 2324. *Abbott* distinguished the
8 Court’s earlier decision in *Hunter v. Underwood* which “involved an equal
9 protection challenge to an article of the Alabama Constitution adopted in 1901 at a
10 constitutional convention avowedly dedicated to the establishment of white
11 supremacy.” *Id.* at 2325 (citing *Hunter*, 471 U.S. at 228–30).

12 Defendant’s instant challenge appears closer to the challenge raised in
13 *Hunter* than *Abbott*, suggesting Congress’s prior racial animus could be imputed to
14 § 1326. *But see Machic-Xiap*, 2021 WL 336278, at *15 (distinguishing the law at
15 issue in *Hunter* from § 1326 because “unlike Alabama’s moral turpitude provision,
16 the 1929 Act does not remain on the books”). Ultimately, though, the Supreme
17 Court in *Hunter* declined to decide whether the Alabama law “would be valid if
18 enacted today without any impermissible motivation.” 471 U.S. at 233. A review
19 of the applicable precedent shows that past discrimination from a prior law,
20 although relevant, does not directly control the *Arlington Heights* analysis of a
21 different law. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 74, 100 S. Ct. 1490,

1 64 L. Ed. 2d 47 (1980) (“[P]ast discrimination cannot, in the manner of original
2 sin, condemn governmental action that is not itself unlawful. The ultimate
3 question remains whether a discriminatory intent has been proved in a given case.
4 More distant instances of official discrimination in other cases are of limited help
5 in resolving that question.”).

6 Defendant further argues that the Court may rely on evidence of prior
7 discriminatory intent, as exhibited by the 1929 Congress, based on the Ninth
8 Circuit’s recent holding in *United States v. Rizo-Rizo*, 16 F.4th 1292 (9th Cir.
9 2021). There, the court observed that “the precursor statutes to both § 1325(a) and
10 § 1326(a), which bear substantially similar language to the modern statutes, were
11 enacted together in 1929 as part of the same bill to regulate unlawful immigration.”
12 *Id.* at 1298. Accordingly, the court noted that “when statutes are enacted shortly
13 after one another and address the same subject and use similar language, that
14 demonstrates Congress’s intent that they have the same meaning.” *Id.* (citing
15 *United States v. Nishiie*, 996 F.3d 1013, 1026 (9th Cir. 2021)). The Government
16 counters that this language concerned only the court’s statutory interpretation of
17 § 1325(a) as a regulatory offense and “is not a directive to compare the 1929 and
18 1952 statutes with one another.” ECF No. 81 at 4.

19 The Court finds that the Government persuasively argues that past
20 discrimination from the 1929 UAA is not directly imputed onto a recodified law,
21 such as § 1326, decades later. Nevertheless, Defendant presents strong evidence

1 concerning the racist historical background in the years and months leading up to
2 the recodification of the unlawful reentry provision in 1952, not just in 1929. The
3 1942 Bracero Program, which continued for a decade after the 1952 INA, provided
4 a pathway for Mexican migrants to work in America while also causing the same
5 migrants to suffer cruel treatment at the border and exploitation of their labor. *See*
6 ECF No. 78-2 at 4, 10. Congress, led by Senator McCarran, allegedly removed
7 obstacles so migrant farmworkers could easily cross the border to appease
8 agricultural growers while simultaneously undermining pathways to citizenship,
9 access to healthcare, and minimum wage for those same migrant workers. *Id.* at
10 18–19; *see also* ECF No. 78-6 at 32. Such a hostile viewpoint for undocumented
11 Mexican farmworkers, while simultaneously refusing to sanction the employers
12 who harbored the farmworkers for cheap labor, is further evidenced by the passage
13 of Senate Bill 1851, derogatively referred to as the “Wetback Bill,” two months
14 prior to the enactment of the 1952 INA. *See* 82 Cong. Rec. 8115 (June 26, 1952).

15 Together, the historical background leading up to 1952, as well as § 1326’s
16 disparate impact on Latinx individuals, provide relevant evidence of potential
17 discriminatory motivation. However, such evidence, on its own, is insufficient to
18 demonstrate that the law violates the Equal Protection Clause and, accordingly, the
19 Court must consider other factors under the *Arlington Heights* framework.

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1 3. *Sequence of Events Preceding the Law’s Enactment*

2 Turning to the events preceding § 1326’s enactment, Defendant first focuses
3 on the 1929 unlawful reentry provision, which Professor Kang alleges was led by
4 “negative stereotype[s]” of Mexican workers “as a cheap, exploitable, and
5 deportable labor force” both by southwestern agribusiness and Eugenicists. ECF
6 No. 78-2 at 3–5; *cf.* ECF No. 61 at 11 (describing the 1929 UAA as “a compromise
7 between nativists and industry”). In the months leading up to the recodification of
8 § 1326 in the 1952 INA, Defendant again highlights the usage of racial slurs in
9 congressional hearings when referring to Mexican immigrants. ECF No. 78-7 at 4
10 (Senator McCarran, co-sponsor of the 1952 INA, refers to the “flood of people”
11 coming into the United States as “wet-backs”); *cf.* ECF No. 78 at 17 (discussing
12 the passage of the “Wetback Bill” as well as “Deputy Attorney General Peyton
13 Ford’s use of the racial slur ‘wetback’ in a letter to the Judiciary Committee
14 regarding the unlawful reentry statute”).

15 The Government counters that “the primary discriminatory intent cited by
16 the Defendant [regarding the 1929 UAA] is neither recent . . . nor proven in the
17 ‘given case,’—*i.e.* the 1952 statute or any of its subsequent versions.” ECF No. 64
18 at 16. In *Regents*, the case reviewing President Trump’s rescission of the DACA
19 program, the Supreme Court deemed that prior statements made by President
20 Trump in relation to Latinos were “remote in time and made in unrelated contexts”
21 and, therefore, “do not qualify as ‘contemporary statements’ probative of the

1 decision at issue.” 140 S. Ct. at 1916 (quoting *Arlington Heights*, 429 U.S. at 268).
2 This Court previously distinguished *Regents* in a case challenging the Public
3 Charge rule, where “the States’ allegations regarding statements by President
4 Trump,” and “by a high-level White House official and a [Department of
5 Homeland Security] decision-maker” occurred between January 2018 and August
6 2019, when the rule being challenged was published. *Washington v. United States*
7 *Department of Homeland Security*, No. 4:19-cv-5210-RMP, 2020 WL 12834440,
8 at *16 (E.D. Wash. Sept. 14, 2020).

9 Returning to the instant motion, the evidence that Defendant provides for
10 events leading up to § 1326, namely Deputy Attorney General Ford’s memo and
11 President Truman’s veto, are less compelling. Although the statements are
12 relatively contemporary with the time period during which § 1326 was drafted, the
13 statements give no direct insight into the motivations of the 1952 Congress that
14 passed the law. *See Machic-Xiap*, 2021 WL 3362738, at *13 (placing little weight
15 on President Truman’s veto as an opponent of the law and noting that President
16 Truman’s full statements reveal that he was most concerned with how the quota
17 system “disfavored immigrants from Asia and southern and eastern Europe,” not
18 Latin America); *see also id.* (agreeing that Deputy Attorney General Ford’s use of
19 the word “wetback” is “evidence of racial animus[,] although the use of the racial
20 slur in the congressional record “is limited evidence of Congress’s purpose in
21 enacting § 1326” because “Ford was not a member of Congress”). Given the

1 limited congressional record regarding § 1326 specifically, both when it was
2 recodified in 1952 and amended in later years, the Court finds that there is
3 insufficient evidence to show that the sequence of events preceding the law
4 provides adequate evidence of a discriminatory motivation.

5 The use of racial slurs by one of the sponsors of the 1952 INA, both before
6 and after the recodification of § 1326, is troubling.¹⁸ However, both Defendant
7 and Professor Kang rely heavily on the assumption that isolated remarks by
8 individual congressmembers provide evidence that the entire congressional
9 sequence of events is replete with discriminatory intent, a proposition that this
10 Court rejects. Absent more direct evidence about § 1326, specifically, the Court
11 makes no such assumption.

12 4. *Procedural and Substantive Departures*

13 Defendant contends that the time period surrounding the passage of the 1929
14 UAA was “the first and only era in which Congress openly relied on eugenics
15 when passing legislation.” ECF No. 61 at 17. Professor Kang highlights Senator
16 McCarran’s efforts to obstruct “effective border enforcement” to further the “labor

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18 ¹⁸ Defendant highlights the use of the racial slur “wetback” by Senator McCarran, a
19 co-sponsor of the 1952 INA, during appropriations hearings in 1951 and 1953.
20 ECF Nos. 78-6, 78-7. The Court also recognizes that a select number of
21 Congressmen using the racial slur “wetback” during a hearing in June 1952,
around the same time that the 1952 INA became law. *See supra* at 8 n.8.

1 exploitation” of Mexican migrants. ECF No. 78-2 at 15–17. Professor Kang
2 imputes Senator McCarran’s supposed tactics to all of Congress based on
3 Congress’s rejection of a proposal for employer penalties to deter unlawful
4 immigration. *Id.* at 14; *cf.* ECF No. 78 at 20 (arguing that “Congress expanded the
5 unlawful reentry statute based on a letter using a racial slur” and “passed § 1326
6 with little debate despite knowing of its disparate impact on Latinxs”).

7 The Court concludes that Professor Kang’s evidence provides a potential
8 explanation for the discriminatory motivations of certain congressmen, such as
9 Senator McCarran. However, at its core, this evidence is speculative and fails to
10 sufficiently establish any procedural or substantive departures in the enactment of
11 § 1326 that would suggest a discriminatory motivation by Congress as a whole.
12 Additionally, the fact that the law passed over President Truman’s veto shows that
13 Congress widely agreed to the provisions established in the INA, including § 1326,
14 which was recodified without much debate.

15 5. *Legislative History*

16 For the final *Arlington Heights* factor, Defendant’s evidence continues to fall
17 short of the standard necessary to demonstrate that § 1326 was enacted with an
18 invidious discriminatory purpose. Defendant first argues that the legislative
19 history of the 1929 provision included overtly racist remarks during congressional
20 hearings and debate. ECF No. 61 at 16. Although the legislative history for
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1 § 1326 is undoubtedly sparser, Defendant argues that Professor Kang’s research
2 “shows that Congress’s relative silence around the recodification of the unlawful
3 reentry statute cannot be read as suggesting an absence of racial animus.” ECF
4 No. 78 at 19. The main support for this argument comes again in the form of
5 President Truman’s veto and Deputy Attorney General Ford’s memo, both of
6 which the Court deems to have little probative value to the motivations of the 1952
7 Congress. Defendant and Professor Kang also dedicate a great deal of briefing to
8 the xenophobic backgrounds of certain legislators and other individuals involved
9 with the passage of § 1326, the subsequent amendments to § 1326, and other
10 immigration law. *See generally* ECF No. 78-2 at 16–21, 26–28, 34–47, 53–55, 57–
11 66, 79–81, 91–93.

12 The Government counters that Defendant highlights only “a small number of
13 legislators per [the] enactment of § 1326” rather than properly focusing on the
14 intent of the entire 1952 Congress or the subsequent Congresses that amended
15 § 1326. ECF No. 81 at 5. Moreover, the viewpoints of those who opposed the
16 law, such as President Truman, provide little insight given that the Supreme Court
17 has cautioned “against the danger, when interpreting a statute, of reliance upon the
18 views of its legislative opponents.” *N.L.R.B. v. Fruit & Vegetable Packers &*
19 *Warehousemen, Loc. 760*, 377 U.S. 58, 66 (1964).

1 Applying the *Arlington Heights* framework, the Court concludes that
2 Defendant fails to meet the burden of demonstrating § 1326 was passed with an
3 invidious discriminatory motivation by Congress as a whole.

4 D. Relevancy of Subsequent Amendments to § 1326

5 The Court next considers whether subsequent amendments to § 1326
6 provide evidence of a discriminatory purpose for the unlawful reentry provision.
7 At the outset, the Court notes that the evidence presented to suggest discriminatory
8 intent for the subsequent amendments is far weaker than the evidence presented for
9 the 1929 and 1952 laws.¹⁹

10 Perhaps recognizing the minimal congressional record for the subsequent
11 amendments to § 1326, Defendant relies on the argument that “[t]hese revisions . .
12 . failed to acknowledge and expunge the racial animus of the 1929 [UAA].” ECF

14 ¹⁹ Similar to the reliance on Senator McCarran’s background in profiling the
15 passage of the 1952 INA, Professor Kang also relies on the racist remarks of
16 several legislators who supported and/or drafted subsequent amendments to
17 § 1326. However, the Government persuasively counters that the legislators
18 “profiled by [Professor] Kang may have drafted and advocated for the various
19 reenactments, but it took a majority of their fellow congressmen—hundreds on
20 each occasion—to ratify those measures into law.” ECF No. 81 at 7. Moreover,
21 the legislative history for the subsequent amendments is relatively sparse, the
amendments “were often enacted by wide margins[,]” and they “‘stirred no debate
in Congress.’” *Id.* at 5–6 (citing and quoting ECF No. 78-2 at 50, 87, 92).

1 No. 78-2 at 103. The *Carrillo-Lopez* decision accepted a similar argument based,
2 in part, on the court’s distinction of *Johnson v. Governor of State of Florida*,
3 405 F.3d 1214 (11th Cir. 2005). *See* 2021 WL 3667330, at *23.

4 *Johnson* involved an equal protection challenge to a felon
5 disenfranchisement law, first codified in the Florida Constitution in 1868.
6 405 F.3d at 1216–18. In rejecting the plaintiffs’ equal protection challenge, the
7 court noted that “[o]ne hundred years after the adoption of the 1868 Constitution,
8 Florida comprehensively revised its Constitution” and chose again “to maintain a
9 criminal disenfranchisement law.” *Id.* at 1220. In doing so, the 1968 Florida
10 Legislature made substantive changes to the law (limiting disenfranchisement to
11 those convicted of felonies) that were sufficient to “eliminate the taint from a law
12 that was originally enacted with discriminatory intent.” *Id.* at 1223.

13 *Carrillo-Lopez* contrasted the changes to § 1326 with the situation in
14 *Johnson* given that the five amendments to § 1326 “did not change” the law’s
15 operation, “but instead served to increase financial and carceral penalties” to
16 strengthen the law’s deterrent value. 2021 WL 3667330, at *23. Neither *Johnson*
17 nor *Carrillo-Lopez* are binding on this Court, although both provide persuasive
18 contrasting viewpoints to consider.

19 Upon review, the Court declines to embrace the “forever tainted” argument
20 at the heart of both the *Carrillo-Lopez* decision and Defendant’s instant motion for
21 two reasons. First, *Carrillo-Lopez*, and by extension Defendant, rely on the

1 premise that § 1326 is inextricably linked to the 1929 UAA, but the laws, although
2 similar, are not one and the same. *Compare* ECF No. 61-14 (1929 Public Law
3 1018 making it a felony punishable up to two years for an “alien” who is “arrested
4 and deported” to “enter or attempt to enter the United States”) *to* Pub. L. No. 82-
5 414, § 276, 66 Stat. 229 (1952 INA § 1326 making it a felony for any “alien who .
6 . . has been arrested and deported or excluded and deported” to enter, attempt to
7 enter, or be found in the United States). This Court has recognized that the
8 similarities between the laws is probative, but not dispositive, of an illicit
9 motivation for § 1326. However, the Court rejects the notion that similarities
10 between two laws enacted decades apart forever taints the later legislation,
11 particularly where the members of Congress have completely changed in the
12 ensuing years.

13 Second, and relatedly, the Supreme Court holding in *Hunter*, imputing
14 discriminatory intent to a racially neutral law based on the existence of a prior
15 discriminatory law does not mean that the ill motivations of prior laws are
16 automatically imputed to a legislative recodification. *See, e.g., City of Mobile*,
17 446 U.S. at 74 (“[P]ast discrimination cannot, in the manner of original sin,
18 condemn governmental action that is not itself unlawful”); *McCleskey v. Kemp*,
19 481 U.S. 279, 298 n.20 (1987) (“Although the history of racial discrimination in
20 this country is undeniable, we cannot accept official actions taken long ago as
21 evidence of current intent.”).

1 This Court has found that Defendant failed to meet his burden under
2 *Arlington Heights* to establish that § 1326 was enacted with an invidious
3 discriminatory purpose. The five subsequent amendments to § 1326 do not
4 change, much less undermine, this finding. Having found that Defendant fails to
5 demonstrate that § 1326 or its five subsequent amendments were enacted with a
6 discriminatory purpose, the Court proceeds to consider the law’s constitutionality
7 under the rational basis review standard.

8 E. Equal Protection Challenge to § 1326 Under Rational Basis Review

9 Laws reviewed under the rational basis standard are upheld “if they are
10 ‘rationally related to a legitimate government purpose.’” *Hernandez-Mancilla*,
11 633 F.3d at 1185 (quoting *Masnauskas v. Gonzales*, 432 F.3d 1067, 1071 (9th Cir.
12 2005)). “Using such rational basis review, a statute is presumed constitutional”
13 and the party challenging the law bears the burden of proving no legitimate
14 government purpose exists. *Masnauskas*, 432 F.3d at 1071.

15 In this case, the Government contends that the Ninth Circuit “already
16 determined that § 1326, with the statute’s clear focus on deterring aliens from
17 unlawfully reentering the United States, satisfies rational basis review.” ECF
18 No. 64 at 14 (citing *Hernandez-Guerrero*, 147 F.3d at 1078). The Government’s
19 argument is in line with the nine other district courts who held that § 1326 is
20 rationally related to legitimate immigration policy. *See, e.g., Wence*, 2021 WL
21 2463567, at *10 (“The United States undeniably has a legitimate interest in

1 regulating its borders and preventing the entry of those who have committed
2 violent and drug-related crimes, as well as the reentry of those who have violated
3 immigration laws in the past.”). Moreover, Professor Kang conceded on cross
4 examination that subsequent amendments to § 1326, such as the 1988 Anti-Drug
5 Abuse Act, are justified by public safety considerations for criminal aliens with
6 aggravated felony convictions.

7 Professor Kang suggests that a healthy skepticism should be applied to
8 drafters of legislation who likely were not thinking about actual crime, but rather
9 their underlying racist motivations to enact such laws. Applying the deferential
10 standard of rational basis review, such “healthy skepticism” is unwarranted,
11 particularly where the congressional record is sparse enough to support only
12 speculations about the internal workings of an individual congressman’s mind.²⁰
13 Accordingly, the Court agrees that evidence about one or more congressman’s
14

15
16 ²⁰ The Court also is reluctant to rely on Professor Kang’s subjective quantification
17 of her belief that the subsequent amendments to § 1326 were motivated by racial
18 animus. On direct examination, Professor Kang repeatedly stated that she had over
19 90% confidence in her assertion that both § 1326 and its subsequent amendments
20 were motivated, in part, by racial animus. However, Professor Kang was unable to
21 support these assertions with any sort of scientific method or basis, and, on cross
examination, she was unable to clarify what evidence would provide 100%
confidence in the belief that racial animus motivated the passage of such laws.

1 racist motivations is insufficient to attribute racial motivation to the entire
2 Congress.

3 The Court next considers whether Defendant has shown that no legitimate
4 government purpose exists for enacting § 1326. *Masnauskas*, 432 F.3d at 1071.
5 Defendant makes no such showing. The Government argues that the purpose of
6 § 1326 is to deter unlawful reentry by giving teeth to civil immigration statutes
7 regarding deportation orders. ECF No. 64 at 13 (citing *Gutierrez-Barba*, 2021 WL
8 2138801, at *5). As for the subsequent amendments to § 1326, the Government
9 notes the same goal of deterrence is evidenced by the “heightened penalties for
10 more serious offenders.” ECF No. 81 at 8. The Court deems the Government’s
11 arguments persuasive and finds that § 1326 is rationally related to the legitimate
12 government interests of border enforcement, criminal deterrence, and public safety.

13 IV. CONCLUSION

14 Overall, Defendant presents evidence of § 1326’s disparate impact as well
15 its troublesome historical background. However, the remaining *Arlington Heights*
16 factors, such as § 1326’s legislative history, fail to sufficiently demonstrate that
17 Congress was motivated, in part, by an invidious discriminatory motivation in
18 recodifying the unlawful reentry provision. Defendant has submitted little more
19 than circumstantial inferences as to the motivations of several congressman
20 regarding broad immigration policy, as opposed to the 1952 Congress’s intentions
21 in enacting § 1326, specifically. Although the Court is cognizant that Defendant

1 has presented evidence of explicit discrimination against the Latinx population in
2 relation to the 1929 law, the Court will not impute such motivations onto a
3 recodified provision passed over twenty years later without supporting evidence of
4 the same discriminatory motivations or intentions.

5 The Court reiterates the viewpoint of its sister court: “[N]othing restrains a
6 future Congress from explicitly disavowing earlier expressions of racism when
7 passing future immigration legislation, especially comprehensive immigration
8 legislation.” *Machic-Xiap*, 2021 WL 3362738, at *15. Absent stronger evidence
9 of discriminatory intent on behalf of the 1952 Congress that enacted § 1326 or the
10 later Congresses who amended the law, the Court rejects Defendant’s instant equal
11 protection challenge.

12 Accordingly, **IT IS HEREBY ORDERED** that Defendant’s Motion to
13 Dismiss, **ECF No. 61**, is **DENIED**.

14 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order
15 and provide copies to counsel.

16 **DATED** February 18, 2022.

17 s/ Rosanna Malouf Peterson
18 ROSANNA MALOUF PETERSON
19 Senior United States District Judge
20
21